Supreme Court, U.S.
FILED

93 1230 JAN 28 1994

No. 93-

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

DAVID P. SCHNEIDER,
Petitioner,

v.

UNITED STATES,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Military Appeals

---

PETITION FOR A WRIT OF CERTIORARI

JAN HORBALY
5310 Renaissance Court
Burke, Virginia 22015
(703) 978-7909
Counsel for Petitioner

Date: January 28, 1994

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

10 pp

QUESTIONS PRESENTED

Whether a service member's court-martial was improperly constituted and lacked jurisdiction to try him because an officer, junior in rank to the service member, participated as a juror in the service member's court-martial and voted on his guilt, and then prior to sentencing was dismissed as a juror when the trial judge learned that the officer (1) was junior in rank to the service member being tried, and (2) was serving as a juror on the court-martial in violation of Article 25 of the Uniform Code of Military Justice, 10 U.S.C. § 625(d)(1) (1988).

Whether a court-martial is collaterally estopped from retrying a service member for misconduct for which he was tried in a state court and acquitted.

Whether federalism precludes a general officer from overriding a decision of a state court in domestic matters.

Whether the errors in the serviceman's court-martial and military appellate review amount to a denial of due process in violation of the Fifth Amendment of the Constitution.

LIST OF PARTIES

Plaintiff-Petitioner is David P. Schneider. Defendant-Respondent is the United States of America.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
A. State Court	2
B. General Court-Martial	4
C. United States Army Court of Military Review	5
D. United States Court of Military Appeals	6
REASONS FOR GRANTING THE WRIT	7
I. THE PETITIONER'S COURT-MARTIAL LACKED JURISDICTION TO TRY HIM BECAUSE IT WAS IMPROPERLY CONSTITUTED	7
II. THE PETITIONER WAS SUBJECTED TO DOUBLE JEOPARDY BECAUSE HE WAS TRIED BY COURT-MARTIAL FOR THE SAME MISCONDUCT FOR WHICH HE WAS TRIED IN STATE COURT AND ACQUITTED	11
III. FEDERALISM PRECLUDES A GENERAL OFFICER FROM OVERRIDING A DECISION OF A STATE COURT IN DOMESTIC MATTERS CONCERNING CHILD SUPPORT AND MAINTENANCE PAYMENTS	18
IV. ERRORS IN PETITIONER'S COURT-MARTIAL AND MILITARY APPELLATE REVIEW AMOUNT TO A DENIAL OF DUE PROCESS IN VIOLATION OF THE FIFTH AMENDMENT OF THE CONSTITUTION	21
CONCLUSION	24

TABLE OF AUTHORITIES

Cases	Page
Ashe v. Swenson, 397 U.S. 436 (1970)	13, 15
Bartkus v. Illinois, 359 U.S. 121 (1959)	12
Bissonette v. Haig, 776 F.2d 1384 (8th Cir. 1985)	17
Brown v. Ohio, 432 U.S. 161 (1977)	12
Brown v. United States, 547 F.2d 438 (8th Cir.), *cert. denied*, 430 U.S. 937 (1977)	15
Courtney v. Williams, 1 M.J. 267 (CMA 1976)	23
Deming v. McClaughry, 113 F. 639 (6th Cir.), *aff'd*, 186 U.S. 49 (1902)	10
Ehrlich v. United States, 145 F.2d 693 (5th Cir. 1944)	14
Grady v. Corbin, 495 U.S. 508 (1990)	15
Heath v. Alabama, 474 U.S. 82 (1985)	12, 15
Holmgren v. United States, 217 U.S. 509 (1910)	22
Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820)	16
McClaughry v. Deming, 186 U.S. 49 (1902)	9
Medina v. California, 112 S.Ct. 2572 (1992)	11
Nix v. Whiteside, 475 U.S. 157 (1986)	13
People v. Ward, 72 Ill.2d 379, 381 N.E.2d 256 (1978)	14
Runkle v. United States, 122 U.S. 543 (1887)	10
Schneider v. Schneider, No. 90DR303 (Leavenworth Co., Kan. Dist. Ct., March 12, 1991)	4
Solorio v. United States, 483 U.S. 435 (1987)	16
State v. Schneider, No. CR189-1592-FX (Platte Co., Mo., Cir. Ct. 1990)	3
United States v. Cuellar, 27 M.J. 50 (CMA 1988), *cert. denied*, 493 U.S. 811 (1989)	6, 12
United States v. Emerson, 1 USCMA 43, 1 CMR 43 (1951)	11
United States v. Ezell, 6 M.J. 307 (CMA 1979)	23
United States v. Facchini, 374 F.2d 638 (9th Cir. 1989) (*en banc*)	22
United States v. Grostefon, 12 M.J. 431 (CMA 1982)	6
United States v. Herring, 916 F.2d 1543 (11th Cir. 1990)	22
United States v. Hicks, 24 M.J. 3 (CMA), *cert. denied*, 484 U.S. 827 (1987)	13

TABLE OF AUTHORITIES—Continued

Page

United States v. Hooten, 12 USCMA 339, 30 CMR 339 (1961) 13
United States v. Lallande, 22 USCMA 170, 46 CMR 170 (1973) 19
United States v. Lonetree, 35 M.J. 396 (CMA 1992) 22
United States v. Quigley, 35 M.J. 345 (CMA 1992) 6
United States v. Schneider, —— M.J. —— (No. 67,806/AR, CMA 1993) 6
United States v. Schneider, 34 M.J. 639 (ACMR 1992) 5
United States v. Sousley, 453 F. Supp. 754 (W.D. Mo. 1978) 15
United States v. Thompson, 517 F. Supp. 1214 (E.D. Ark. 1981) 15
United States v. Warren, 13 M.J. 278 (CMA 1982) 13
United States v. Williams, 341 U.S. 58 (1951) 14
Williamson v. Williamson, 247 GA. 280, 275 S.E.2d 42 (1981), *cert. denied*, 454 U.S. 1097 (1982) 18

Statutes

U.S. CONST., Art. III 23
U.S. CONST., Amend. 5 2
Art. 25(d)(1), 10 U.S.C. § 825(d)(1) (1988) 2, 8
Art. 36(a), 10 U.S.C. § 836(a) (1988) 23
Art. 60(c), 10 U.S.C. § 860(c) (1988) 19
Art. 66, 10 U.S.C. § 866 (1988) 6
Art. 67a(a), 10 U.S.C. § 867a(a) (Supp. 1992) 2
18 U.S.C. § 1001 (1988) 22
28 U.S.C. § 1259(3) (1986) 2
40 MO. REV. STAT. ANN., § 558.011.1(1) (1979) 3
40A MO. REV. STAT. ANN., § 565.050 (1979) 3

TABLE OF AUTHORITIES—Continued

Rules Page

MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984 ..... *passim*

Regulations

Legal Services: Military Justice, ARMY REGULATION 27-10 (Jan. 25, 1990) 22

Personal Affairs; Family Support, Child Custody and Paternity, ARMY REGULATION 608-99 (Nov. 4, 1991) 19

Miscellaneous

STANDARDS RELATING TO THE APPELLATE COURTS 46 (1977) 6

P. BATOR, P. MISHKIN, D. MELTZER & D. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1460-64 (3rd ed. 1988) 20

W. DOUGLAS, THE RIGHT OF THE PEOPLE 101 (1950) 21

F. GILLIGAN & F. LEDERER, COURT-MARTIAL PROCEDURE 7-60.00 (1991) 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-

DAVID P. SCHNEIDER,

Petitioner,

v.

UNITED STATES,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Military Appeals

---

PETITION FOR A WRIT OF CERTIORARI

David P. Schneider petitions for a writ of certiorari to review an opinion and judgment of the United States Court of Military Appeals entered on September 30, 1993. The United States Court of Military Appeals affirmed the opinion and judgment of the United States Army Court of Military Review which upheld the findings and sentence in Major Schneider's general court-martial.

OPINIONS BELOW

The decision of the Missouri Circuit Court which acquitted Major David P. Schneider of a class A felony assault in his wife's seven-story fall is not reported. The Action of the Convening Authority, Lieutenant General Leonard P. Wishart III, approving the findings and sentence in Major Schneider's general court-martial is not reported. It appears in the Appendix at 38a. The Joint Entry of Divorce entered on March 12, 1991 by the District Court of Leavenworth County, Kansas, is unreported.

It appears in the Appendix at 31a. The decision of the United States Army Court of Military Review is reported at 34 M.J. 639 (ACMR 1992). It appears in the Appendix at 19a. The decision of the United States Court of Military Appeals is unreported. It appears in the Appendix at 1a.

JURISDICTION

The jurisdiction of this Court is invoked under 10 U.S.C. § 867a(a) (Supp. 1992) and 28 U.S.C. § 1259(3) (1968). The judgment of the United States Court of Military Appeals was entered on September 30, 1993. An order (A-430) was entered on November 23, 1993 extending the time to file this petition for a writ of certiorari until January 28, 1994.

STATUTES INVOLVED

Article 25(d)(1) of the Uniform Code of Military Justice, 10 U.S.C. § 825(d)(1) (1988) provides:

> When it can be avoided, no member of an armed force may be tried by a court-martial any member of which is junior to him in rank or grade.

The Fifth Amendment to the Constitution of the United States provides:

> No person . . . shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . nor be deprived of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

A. State Court

Petitioner was prosecuted in 1990 in state court in Platte County, Missouri, on a charge of class A felony assault alleged to have occurred in connection with injuries his wife sustained in a seven-story fall at the Embassy Suites Hotel, Tiffany Springs, Missouri, on November 4, 1989. The information charged:

> [T]hat David P. Schneider, in violation of Section 565.050 [Revised Missouri Statutes], committed the class A felony of assault in the first degree, punishable upon conviction under Section 558.011.1(1), [Revised Missouri Statutes], in that on or about November 4, 1989, in the County of Platte, State of Missouri, the defendant attempted to kill or cause serious bodily injury to Deborah A. Schneider by pushing her from the eighth floor hallway onto the floor below, approximately seventy (70) feet, and in the course thereof, inflicted serious physical injury on her.

First Amended information, *State v. Schneider*, No. CR189-1592-FX (Platte Co., Mo., Cir. Ct. filed June 11, 1990). The Army was in direct contact with the state prosecutor (R. 33-34), had personnel attend open hearings in the state case (R. 34, 36, 69, 73-75), and assisted in the state's efforts to obtain evidence with which to convict Petitioner (R. 35). A Criminal Investigation Division (CID) officer was present at the joint interrogation of witnesses (R. 37, 41-42). At the request of local police, CID interviewed a prosecution witness in California (R. 50), and reported the results back to the local police (R. 52). Evidence relating to that witness was in fact introduced in the state trial (R. 39). CID aided local police investigative efforts concerning medical records and information pertaining to the event that led up to the incident (R. 43, 52-53, 57-58), and in obtaining demonstrative evidence (a toilet tank lid) for use in the state trial (R. 49-50). Without being asked, CID furnished telephone bills to the police (R. 58).

After a jury trial, Petitioner *was acquitted* of the class A felony assault charge in state court.

The Schneiders, who have two children, were divorced by the District Court of Leavenworth County, Kansas, on March 12, 1991. The court entered a decree awarding Mrs. Schneider maintenance and child support. Among other things, the decree requires Petitioner to pay 40%

of his income as child support until the children reach majority or pending further order of the court, and 25% of his income as maintenance for 120 months unless Mrs. Schneider predeceases him, remarries or cohabits. *Schneider v. Schneider,* N. 90DR303 (Leavenworth Co., Kans., Dist. Ct., March 12, 1991). Pet. at 33a. Each party bore its own attorney fees in the divorce proceeding.

B. General Court-Martial

After Petitioner was acquitted in the state court, he was tried by a general court-martial at Fort Leavenworth, Kansas, for attempted murder of his wife and for conduct unbecoming an officer by committing perjury and by having an affair with another woman. He was tried on September 28, October 15, November 5, and November 13-17, 1990 by a court of officers. The court convicted Petitioner of the charges and sentenced him to be dismissed from the service, to be confined for twenty-three years, and to forfeit all pay and allowances. Pet. at 20a. The convening authority, Lieutenant General Leonard P. Wishart III, denied Petitioner's request for deferment of the sentence to confinement. On February 15, 1991, General Wishart approved the findings and sentence of the court-martial, but "conditionally suspended the forfeiture in excess of $400 pay per month until execution of the dismissal." [1] The condition required by the General was that Petitioner divert all pay and allowances above $400 to his former wife—a sum in excess of that provided for in the divorce decree subsequently entered by the state court.

> However, the execution of that part of the sentence extending to forfeiture of all pay and allowances in excess of $400.00 per month is suspended until the execution of that part of the sentence extending

[1] *Id.* This means that instead of forfeiting all of his pay and allowances, Petitioner was required to forfeit only $400 per month until he was dismissed from the United States Army.

> to a dismissal from the service, at which time, unless the suspension is sooner vacated, the suspended part of the sentence will be remitted without further action, this suspension being on the conditions that the accused continuously claim on an Internal Revenue Service Form W-4, so long as he may legitimately do so, that he is single with two dependents, and that he initiate and maintain a monthly military pay allotment to be paid directly to Deborah A. Schneider in the amount of $2500.00. The remainder of the sentences, except for that part of the sentence extending to a dismissal from the service, will be executed.

Pet. at 38a. The Schneiders' divorce, which was the subject of attention in the local press, had an effective date after this action was entered. The divorce decree calls for Petitioner to pay child support and maintenance at a lesser rate than that provided in the convening authority's action. Pet. at 33a and 38a. As a result, the convening authority was asked to modify the action to conform with the divorce decree, and he refused to do so.

C. United States Army Court of Military Review

The case was heard on mandatory review by the United States Army Court of Military Review on January 21, 1992. For reasons that are unclear, the courtroom was locked and a guard was posted during the argument, preventing some civilians from attending as well as the then Chief of the Defense Appellate Division and other judge advocates from that Division.

On January 31, 1992, the week after hearing oral argument, the Army Court of Military Review issued its decision affirming the findings and sentence imposed in Major Schneider's general court-martial. *United States v. Schneider*, 34 M.J. 639 (ACMR 1992). Pet. at 19a. In addition to the remarkably short time that elapsed between oral argument and the issuance of the court's lengthy decision, there are signs of inattention to detail in the Court's opinion. Specifically, the opinion claims

that the court had "examined the assertions of error personally raised by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (CMA 1982) and [found] them also to be without merit." Pet. at 30a. In fact, Petitioner raised no Grostefon issues in his appeal to the Army Court of Military Review.[2]

D. United States Court of Military Appeals

On discretionary review, the United States Court of Military Appeals affirmed. Thirteen of the 15 issues raised by Petitioner were granted and addressed by the Court of Military Appeals. At least a third of the Court's opinion addresses the issue concerning the sufficiency of the evidence with regard to incidents which occurred four years earlier and 1200 miles away.

In addition, the Court holds that "the doctrine of collateral estoppel is inapplicable to prosecutions by a separate sovereign." Pet. at 8a. To support this contention, the Court relies on *United States v. Cuellar*, 27 M.J. 50, 54-55 (CMA 1988), *cert. denied*, 493 U.S. 811 (1989). Pet. at 8a. The Court also holds that it detects "no possibility" of "prejudice" in the fact that one of the court members who voted on Petitioner's guilt during findings portion of the trial was serving on the court in violation of Article 25 of the Uniform Code of Military Justice. Pet. at 12a. Furthermore, the Court holds that the "sen-

---

[2] Given the United States Court of Military Appeals' reaffirmation of the importance of *Grostefon* issues, this denial of *Grostefon* issues where none were raised is evidence of rote decision making which is incompatible with the requirement in Article 66 of the Uniform Code of Military Justice, 10 U.S.C. § 866 (1988), which states that issues raised before the Court must be given meaningful review. *United States Quigley*, 35 M.J. 345, 348 (CMA 1992). If "[f]airness and persuasiveness in appellate adjudication require that the parties have . . . confidence that their contentions have been considered," the converse is also true: that a court which purports to deny phantom contentions does not instill confidence that contentions which in fact have been raised are being properly considered. STANDARDS RELATING TO APPELLATE COURTS 46 (1977).

tence handed down by a court-martial is independent of any civil judgment" and that, in any event, even if there is an error in the sentence as modified by the convening authority. Petitioner "does not stand to benefit." Pet. at 12a, 13a.

Petitioner remains in confinement at the United States Disciplinary Barracks at Fort Leavenworth, Kansas.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

A. Lack of Court-Martial Jurisdiction

The first reason the Supreme Court should grant the petition for a writ of certiorari in this case is because the court-martial lacked jurisdiction to try Petitioner. In order for the judgment of a court-martial to be valid, the court-martial must have jurisdiction to try the case. This means that the government has the burden in each case to prove the five elements of jurisdiction which Congress has provided for in the Uniform Code of Military Justice.

First, the government must prove that the court-martial is *properly convened*, that is, that the court-martial was convened by an official empowered to convene it. *Second*, the government must prove that the court-martial is *properly constituted*, that is, that the accused is present or his absence is accounted for, that a trial counsel and a defense counsel are detailed to the court and are present; that a military judge is detailed to hear the case and is present; that the court members were personally selected and detailed to the court by the convening authority, are eligible to serve, and are present, or their absence accounted for. *Third*, the government must prove that the court-martial has jurisdiction over the person, that is, an enlistee, an inductee, an officer, a retired member, a national guardsman, a reservist, or in some cases, a civilian; that the court has jurisdiction over the person at the time of trial, and that jurisdiction over the person has not been terminated for any reason. *Fourth*, the government must prove that the court-martial has jurisdiction *over the offense*,

that is, that the offense is a crime under the Uniform Code of Military Justice and that the service member was in a military status when the offense was committed. And, *fifth*, the government must show that the *sentence adjudged is within the maximum permissible punishment authorized by law*, that is, that the sentence is within the limits prescribed by the Code for summary, special or general courts-martial, and that it is not in excess of that which is authorized by the Maximum Punishment Chart in the Manual for Courts-Martial.

In the present case, Petitioner contends that the court-martial which tried him was not properly constituted. During the trial and after findings, the trial judge learned that Major Horrell, one of the court members hearing Petitioner's case was junior in rank to the Petitioner. Article 25(d)(1) of the Uniform Code of Military Justice states that "[w]hen it can be avoided, no member of an armed force may be tried by a court-martial any member of which is junior to him in rank or grade." Art. 25(d)(1), U.C.M.J., 10 U.S.C. § 825(d)(1) (1988).

The military judge confirmed that Major Horrell was junior in rank to Petitioner. When the defense counsel learned of her unlawful participation in the case, he presented a motion for a mistrial. Without receiving evidence from the government as to whether the appointment of Major Horrell was unavoidable, the military judge denied the motion for a mistrial. The military judge, however, permitted the defense counsel to challenge Major Horrell. The military judge granted the challenge and removed Major Horrell as a court member from Petitioner's trial. Major Horrell voted on the findings in Petitioner's case, but she did not participate in adjudging the sentence.

The military judge's removal of Major Horrell from the court confirms that she participated in Petitioner's court-martial in violation of Article 25 of the Code and that Petitioner's court-martial was improperly constituted. Major Horrell was an active participant in the court's

sessions and deliberations. She queried witnesses during the trial and obtained clarification of the judge's instructions on findings. *See* App. Ex. XIX-XX, XX, XXXVII, XLI, XLVIII, LIII. R. 735. Clearly, if her presence on the court-martial was not jurisdictional error and her participation in the proceedings was not prejudicial to Petitioner, the military judge would not have dismissed her, but would have permitted her to continue to participate in sentencing on the ground that her participation was not harmful or prejudicial to Petitioner.

In *McClaughry v. Deming*, 186 U.S. 49 (1902), the Supreme Court of the United States granted relief to a petitioner who had been tried by a court-martial which was illegally constituted. In *Deming*, an officer of the Volunteer Army was tried by a court-martial in which the court members consisted of officers from the Regular Army. The Supreme Court held that the petitioner's court-martial was improperly constituted because the federal statute governing trial by courts-martial required that members of the Volunteer Army were to be tried by courts-martial composed of officers from the Volunteer Army, not from the Regular Army. *Id.* at 62-64. The Supreme Court did not hold that the presence of officers from the Regular Army was a waivable by the accused, but instead the Court held that the presence of members who do not meet the requirements of the statute is jurisdictional error.

In his opinion for the Eighth Circuit in *Deming*, Judge Walter H. Sanborn correctly identified the five elements of court-martial jurisdiction.[3] Judge Sanborn also cor-

---

[3] [T]he jurisdiction of every court-martial, and hence, the validity of each of its judgments, is conditioned upon these indispensable prerequisites: (1) That it was convened by an officer empowered by the statutes to call it; (2) that the officers whom he commanded to sit upon it were of those whom he was authorized by the articles of war to detail for that purpose; (3) that the court constituted was invested by the acts of

rectly states the general rule that "[t]he absence of any of these indispensable conditions renders the judgment and sentence of a court-martial . . . absolutely void." *Deming v. McClaughry*, 113 F. 609, 650 (8th Cir.), *aff'd*, 186 U.S. 49 (1902).

In discussing generally the subject of court-martial jurisdiction, Judge Sanborn noted that courts-martial are "courts of inferior or limited jurisdiction," and that they are not courts of general jurisdiction. *Id.* There is a "legal presumption," he said, "that courts of general jurisdiction have the power and the authority to make the adjudications which they render, and that their judgments are valid." *Id.* This principle, however, does not apply to "courts of inferior or limited jurisdiction," like courts-martial. Indeed, with regard to such courts, the legal presumption may be said to be just the opposite, namely, that in order for the judgment and sentence of a court-martial of limited jurisdiction to be valid, [its] jurisdiction [must] be clearly and equivocally shown." *Id.* Because a "court-martial is a court of limited jurisdiction" and "a creature of statute," it "follows that the jurisdiction of every court-martial, and hence the validity of each of its judgments, is conditioned" on the presence of each of the "indispensable prerequisites," namely, the five elements of jurisdiction. *Id.*

In *Runkle v. United States*, 122 U.S. 543 (1887), the Supreme Court states that when a court-martial begins, "it must appear affirmatively and unequivocally that the court was *legally* constituted," that is, that those who are required to be present by statute are indeed present and

---

Congress with power to try the person and the offense charged; and (4) that its sentence was in accordance with the Revised Statutes

Deming v. McClaughry, 113 F. 639, 650 (8th Cir.), *aff'd*, 186 U.S. 49 (1902). Judge Sanborn joined together in part (3) two of the elements of court-martial jurisdiction, but he nevertheless correctly identified the five elements of court-martial jurisdiction.

that they possess the qualifications necessary to serve as participants in a court martial. *Id.* at 556. If the court-martial is not properly constituted, it does not have jurisdiction to try the accused.

The burden is on the government to establish the five elements of jurisdiction in every court-martial trial. While the element of properly constituted courts-martial is not often litigated, it is an important aspect of military jurisdiction. Indeed, since the beginning, the United States Court of Military Appeals has stated "that military courts-martial must be convened strictly in accordance with [the Uniform Code of Military Justice]." *United States v. Emerson,* 1 USCMA 43, 45, 1 CMR 43, 45 (1951). Because the record in the present case fails to establish clearly that the court-martial was properly constituted, and thus had jurisdiction to try Petitioner, Counsel for Petitioner requests the Court grant the Petition for a Writ of Certiorari.

B. Double Jeopardy

The Petitioner was acquitted in a state court in June. Five months later, in November, Petitioner was retried for the same conduct in a military court. Although fancy words may be used to find shades of meaning, the bottom line is that this is double jeopardy. This action on the part of the military "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina v. California,* 112 S. Ct. 2572 (1992). The military recognized that prosecuting Petitioner on the hotel charge would offend Army policy concerning sequential civilian and military prosecutions. Rather than allowing the case to go forward on the attempted murder and adultery charges, the command elected to frame the hotel charges as perjury. This manipulation of the process was not in keeping with the standards of military justice and should be rejected by this Court.

There are two reasons why this aspect of the military's action should be proscribed. First, the issue of whether Mrs. Schneider accidently or deliberately fell in the hotel was resolved by the acquittal in the Missouri state court. The elements of the perjury specification in the military tribunal's charge was thus collaterally estopped from relitigation. Second, this case deals with an instance of *autrefois acquit*; distinctly different from the *autrefois convict* cases that defined the double jeopardy standard.

The Army Court of Military Review held that "[t]he doctrine of collateral estoppel has not been applied in military criminal law." Pet. at 28a. Further, the decision observes that "prosecution of an offense in state court does not normally bar a federal prosecution of the same criminal matter." *Id.* at 28a. The Court of Military Appeals agreed. *Id.* at 8a.

Petitioner suggests that the real message of *Heath v. Alabama*, 474 U.S. 82 (1985), and *Bartkus v. Illinois*, 359 U.S. 121 (1959), cited by the Army Court of Military Review, has more to do with states' rights than with the pursuit of criminals. The Army Court of Military Review incorrectly uses these decisions as the underpinning for their general belief that they can retry service members at will. Justice O'Connor makes clear in *Heath* that successive prosecutions are barred by the Fifth Amendment if the offenses are the "same." If the Court of Military Review had applied the standard announced in *Brown v. Ohio*, 432 U.S. 161 (1977) to the present case, it would have concluded that it was precluded from picking an equivalent charge on which to retry Petitioner.

Cuellar, which the Court of Military Review relies on, does not stand for the proposition that "collateral estoppel has not been applied in military criminal law." The issue in *Cuellar* was whether evidence of prior acts which Petty Officer Cuellar had been acquitted of in state court could be introduced in his court-martial as uncharged miscon-

duct. While the Court purported to reaffirm the decision in *United States v. Hicks*, 24 M.J. 3 (CMA), *cert. denied*, 484 U.S. 827 (1987), it expressly acknowledged that even this use would be barred by collateral estoppel if the earlier acquittal had been by a court-martial or a federal district court.

In addition, the Court of Military Appeals observes in *United States v. Warren*, 13 M.J. 278 (CMA 1982), that:

> [t]he right to testify in one's own behalf has carried with it amenability to prosecution for perjury. Indeed, a defendant who takes the stand runs the risk that—unless he is acquitted by a jury verdict which under the circumstances of a particular case gives rise to collateral estoppel, *see United States v. Hooten*, 12 U.S.C.M.A. 339, 30 C.M.R. 339 (1981), and *Ashe v. Swenson*, 397 U.S. 438 [(1970)], he may be prosecuted for perjury by reason of the testimony he has given.

Id. at 281 (citations omitted). *See also* 1 F. GILLIGAN & F. LEDERER, COURT-MARTIAL PROCEDURE §7-600.00. Thus, contrary to the decision in the Court of Military Appeals, collateral estoppel definitely has a role to play in military criminal law.

The question is what that role is where the charged offense (rather than "other acts") is a rerun, under a different label, of matter that resulted in an acquittal in a state court. As Justice Blackman observed, concurring in the judgment in *Nix v. Whiteside*, 475 U.S. 157 (1986):

> It is no doubt true that juries sometimes have acquitted defendants who should have been convicted, and sometimes have based their decisions to acquit on the testimony of defendants who lied on the witness stand. It is also true that Double Jeopardy bars the reprosecution of such acquitted defendants, although *on occasion* they can be prosecuted for perjury.

Id. at 186 (emphasis added). The underscored words confirm that the government does not enjoy an unqualified right to try a person who is believed to have given perjured testimony in his or her own defense in a criminal case. If the testimony goes to the heart of an issue that was necessarily determined favorably to the accused in the first case, the prosecution is collaterally estopped from charging that the testimony constituted perjury. *United States v. Williams,* 341 U.S. 68, 64 n.3 (1961).

This principle is illustrated in *Ehrlich v. United States,* 145 F.2d 693 (5th Cir .1944) (dismissing perjury indictment following directed verdict of acquittal on related price control charges) and *People v. Ward,* 72 111.2d 379, 381 N.E.2d 258 (1978) (perjury conviction overturned where new trial had been granted setting aside guilty verdict and no retrial occurred). Petitioner's case is similar to these, except that Petitioner was acquitted by the Missouri jury, rather than the beneficiary of a judge's entry of a directed verdict or a new trial order. The perjury charge in Petitioner's case is a direct assault on the state jury's determination because it goes directly to the crime with which Petitioner was charged with in state court.

At Petitioner's court-martial, it soon became apparent that, as far as the government was concerned, the perjury charge represented a second opportunity to convict Petitioner for allegedly attempting to kill his wife at the hotel. In voir dire, trial counsel tellingly advised the court members:

> The prosecution will place into evidence the testimony of Major Schneider in a civilian trial of a charge relating to *one of the attempted murders.* R. 15 (emphasis added).

An even stronger indicator that the perjury specification was the hotel charge with a fresh coat of paint appears in the instructions on findings. The military judge in-

structed the court members that in order to convict, they must be convinced beyond a reasonable doubt that Petitioner's testimony in the Platte County court, that he accidentally dropped his wife over the railing as she slipped from his grasp, and that he did not intend to harm her, was false (R. 714).

A comparison with the state judge's charge to the civilian jury makes it clear that Petitioner had already stood in judgment for the same conduct. *See* Def. App. Ex. 2. Put another way, at the court-martial, the government sought to prove "the entirety of the conduct" of which Petitioner had been acquitted in the first trial. *See Grady v. Corbin*, 495 U.S. 508 (1990).

This Court cautions that the collateral estoppel doctrine should not be applied "with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality." *Swenson, supra* at 444. In the present case, it is clear that the perjury charged is the same basic matter that was at issue in the Platte County trial. *See e.g., Brown v. United States*, 547 F.2d 438 (8th Cir.), *cert. denied*, 430 U.S. 937 (1977); *United States v Thompson*, 517 F. Supp. 1214 (E.D. Ark. 1981); *United States v. Sousley*, 453 F. Supp. 754 (W.D. Mo. 1978).

Second, the present case is not *"autreofis convict"* but *"autrefois acquit."* There is an important difference between dual sovereignty cases involving a claim that a particular offense has been previously punished and cannot properly be punished a second time, and those in which, as here, the individual has previously been acquitted. A person who has previously been convicted by definition has been found guilty of an offense. Such a person's reasonable expectations of fairness are less at issue than where a person has been acquitted. *See Heath, supra,* at 86. This is a difference which the law can and should take cognizance of in the administration of the protection against double jeopardy.

The final reason that the repetitive prosecution should be rejected is because the status of *in personam jurisdiction* attached to military members as a result of this Court's decision in *Solorio v. United States*, 483 U.S. 435 (1987), unfairly subjects military members to double jeopardy situations in violation of the Fifth Amendment. When the dual sovereignty concept was suggested in dictum in *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 75 (1820), the states were not subject to the demands of the Bill of Rights through the Fourteenth Amendment's due process clause. Today that is no longer true. There is a distinctly artificial ring to the notion that the federal government and the states are "dual" sovereigns at all. The judges of each are compelled to take an oath to support the United States Constitution, U.S. CONST., art. VI, cl. 3, and that Constitution makes considerable demands on the states in terms of the conduct of criminal prosecutions. It may be, therefore, that the dual sovereignty doctrine merits continued respect in the context of prosecutions by foreign nations, but its use in the current context elevates a metaphysical proposition into a substantive deviation from the purpose of the double jeopardy clause.

One imagines a citizen of State A (State A has *in personam jurisdiction* similar to the military's) driving to State B. The citizen uses his bare hands to assault a resident of B. After a jury trial in B, the citizen of A is acquitted. Upon returning to A, the citizen is prosecuted by A for the assault. Petitioner submits that this would never be countenanced in the United States today. Yet, this is precisely the situation of Petitioner in the present case.

There is a long history of limiting military involvement in civilian affairs beginning with the Declaration of Independence and continuing in the Constitution, certain acts of Congress, and many decisions of this Court. It is routinely acknowledged that "military enforcement of the

civil laws leaves the protection of vital fourth and fifth amendment rights in the hands of persons who are not trained to uphold these rights." *Bissonette v. Haig*, 776 F.2d 1384, 1387 (8th Cir. 1985).

Over the years, this Court has controlled carefully the types of issues the military courts are allowed to decide. Such a level of control would never be sanctioned by the States. Yet, the military seeks to hold itself up to the same level as the state courts. Not unlike the Native American Indian tribal courts, the military justice system does not have the same scope as the state, or other federal courts. Not surprisingly, the military has its own Military Rules of Evidence. These conditions do not prevail in the remainder of the court systems that protect the liberties of citizens of this nation. Historically, the military has excused abridgement of these liberties by citing military necessity.

Finally, Petitioner's case presents the Court with an opportunity to reexamine the doctrine of *in personam jurisdiction* as refined by this Court's decision in *Solorio*. When Petitioner became an officer, military jurisdiction was limited in scope. Military jurisdiction was interpreted as being a geographically defined area fixed, usually by surveyors, with finite boundaries. One was either *in* or *out* of a given jurisdiction. By virtue of *Solorio*, the scope of military jurisdiction was greatly expanded. Now wherever Petitioner goes, for the rest of his life (Petitioner has Regular Army status), regardless of how many other jurisdictions he may be standing in, he is subject to military jurisdiction.

While this enables the military to exercise jurisdiction over military members serving in foreign nations, on the high seas, and anywhere in the United States or its territories, it also subjects military members to the multiple jeopardy problem experienced by Petitioner in the present case. Native American Indians are subject to an analogous tribal justice system when on their reservations. Un-

like service members, however, the code to which Native American Indians are subject does not follow them off the reservation and into the local community.

Counsel for Petitioner requests the Court grant his Petition for a Writ of Certiorari because he was tried twice for the same misconduct, once by the State of Missouri and once by the military, in violation of the Double Jeopardy Clause of the Fifth Amendment to the Constitution.

C. Federalism

The third reason the Supreme Court should grant the petition for a writ of certiorari in the present case is because Petitioner's case presents an important question of first impression relating to the relationship between local state courts and the military judicial system.

In the present case, Petitioner contends that the convening authority violated elementary principles of federalism in directing Petitioner to pay more in child support and maintenance than Petitioner was required to pay under the terms of the divorce decree granted to Petitioner and his wife by the state court. The general rule is that the federal government is intent to leave the implementation of child support and alimony obligations to the state courts. *Williamson v. Williamson*, 275 S.E.2d 42, 24 Ga. 260 (1981), *cert. denied*, 454 U.S. 1097 (1982). While not abrogating all responsibility for such domestic actions, the Congress expressly waived the sovereign immunity of the United States in this area to insure that local domestic relations laws would be properly empowered.

In the past, states did not have the power to enforce child support payments across state lines. Under laws enacted by Congress, states now have the primary role in settling domestic issues. In the present case, the action of the convening authority served to nullify the decision of the county court operating under Kansas law. Com-

pare Pet. 33a with Pet. 38a. By establishing himself as a special master with the power to modify the effort of the state court, the convening authority violated the spirit and letter of Army Regulation 608-99 which establishes appropriate levels of spousal support and ignored the decision arrived at by a competent judge acting according to Kansas state law. While the sentence determined by the court-martial may be independent of any other action, the convening authority cannot approve a sentence imposing upon a defendant greater child support and alimony payments than set by the state court in a divorce decree.

In fashioning the suspension condition described above, the convening authority imposed monetary obligations on Petitioner harsher than those subsequently imposed by the divorce decree adjudged by the Kansas court. Petitioner was ordered to pay the higher amount and was threatened with another court-martial for disobedience if he did not comply.

In *United States v. Lallande*, 22 USCMA 170, 46 CMR 170 (1973), the Army Court of Military Review stated that:

> [t]he convening authority's action is based upon federal statute, and his action in approving a court-martial sentence is within his sole discretion. See UCMJ art. 60(c), 10 U.S.C. § 860(c). It is separate from and can be taken without regard to a state court civil action.

Id. at 173, 46 CMR at 173. The Army Court of Military Review's statement ignores the limited purposes of the Uniform Code of Military Justice and its relationship to the American federal system. The UCMJ is not a domestic relations statute. Army regulations contemplate that commanders will not adjudicate family support matters that are finally resolved by state courts by imposing support levels on service members in excess of that provided in state court support agreements. *See Personal*

Affairs: Family Support, Child Custody, and Paternity, AR 608-99, paras. 2-4a(3), 2-10a (Nov. 4, 1991).

Petitioner contends that it is an abuse of discretion for a commander to substitute his views for what is an appropriate support payment for the judgment of a state court of competent jurisdiction which has entered a decree in a domestic relations case where both parties have been represented by counsel. Doing so needlessly injects the federal government into an area which Congress intentionally has left to the states and in which the federal courts have been reluctant to become involved. *See generally* P. BATOR, P. MISHKIN, D. MELTZER & D. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1460-64 (3rd ed. 1988).

The Supreme Court need not in this case decide the outer limits of a convening authority's power in the absence of a state decree determining the parties' financial obligations to one another, but it should hold that where there is such a decree, the convening authority must abide by it.

Alternately, assuming that the presence of a state decree does not rule out the convening authority's imposition of support conditions in acting on a court-martial, the command must shoulder a heavy burden in explaining why a need exists to intrude on a matter reserved to the states where the divorce court has special expertise, can oversee discovery which is necessary to framing a proper decree, and can take into account the parties' entire financial picture.

Petitioner respectfully submits that it offends public policy of the highest order when a convening authority—a federal official—with no "express grant of authority for such action" undertakes to rule on domestic relations matters which are committed to the states for decision, and as here, have actually been decided by a state court of competent jurisdiction. For this reason, Petitioner sub-

mits that the Supreme Court should grant the petition for a writ of certiorari to resolve the important question presented in this case concerning the relationship between local state courts and the military judicial system.

D. Denial of Due Process

The third reason the Supreme Court should grant the petition for a writ of certiorari in the present case is because Petitioner has been denied due process in his court-martial and in the appellate review of his case. The sloppiness in opinion writing, the lack of attention to detail in conducting courts-martial, and the failure to follow the laws and regulations governing military matters Petitioner contends is inexcusable.

Civilian control of the military is one of the fundamental principles upon which the American Government is based. Like the President of the United States who is the Commander in Chief of the Armed Forces, and the United States Congress which has the power to declare war and which exercises control over the military budget, Article III judges have an important responsibility to insure that service members are accorded due process in military trials and that their constitutional rights are not violated in military court proceedings. The amount of control the federal judiciary exercises over the armed forces is not great. The power federal judges have, however, is important because it is they who "insur[e] that the military . . . act[s] within the area assigned to it by Congress and the Constitution [and it is they who] insure[too] that the military's own judicial system . . . remain[s] subject to ultimate civilian control on basic issues." W. DOUGLAS, THE RIGHT OF THE PEOPLE 181 (1958). In short, like the executive and legislative branches, the federal judiciary has a responsibility to exercise control over the military and it does so by insuring that the constitutional rights of American service men and women are protected in military trials.

The failure of the military to follow basic statutory requirements and regulations is illustrated not only by the failure of the military to comply with the seniority requirements of Article 25 of the Uniform Code of Military Justice, but also in the Command's decision to retry Petitioner for misconduct for which he was acquitted in state court. Army Regulation provides that "[a] person subject to the UCMJ who had been tried in a civilian court . . . ordinarily will not be tried by court-martial or punished under Article 15, UCMJ, for the same act over which the civilian court has exercised jurisdiction." *Legal Service: Military Justice,* AR 27-10, para. 4-2 (Jan. 25, 1990).

The lack of prosecutions by courts-martial for perjury in cases where civilian courts have exercised jurisdiction and acquitted military personnel is seen in the absence of reported cases in which such prosecutions have been pursued. It is one thing for the federal government to seek to punish such perjury when the state court is performing a federal function, as where the perjury occurs in a state naturalization proceeding pursuant to an act of Congress. *See Holmgren v. United States,* 217 U.S. 509, 518-17 (1910). It is another matter where the state court's sole function is to determine, as here, whether its own law has been violated. Compare *United States v. Facchini,* 874 F.2d 638, 641-43 (9th Cir. 1989) (en banc) (false statements to a state agency in connection with claims for state-funded unemployment compensation held not a violation of 18 U.S.C. § 1001), with *United States v. Herring,* 916 F.2d 1543, 1546-47 (11th Cir. 1990).

The closing and locking of the doors of the Army Court of Military Review courtroom prior to oral arguments in Petitioner's case and refusing to let Petitioner's friends and family members attend the courtroom once it was locked is inexplicable. The United States Court of Military Appeals excuses this strange behavior by stating that since there is "no requirement for oral argument at all," Petitioner was not harmed. Pet. at 18a. The Court also relies on *United States v. Lonetree,* 35 M.J. 396, 411-12 (CMA

1992), to justify the locking of the courtroom doors before argument. In *Lonetree*, the Court justified the Court of Military Review's closure order because classified information was being discussed. There is nothing classified, however, in Petitioner's case. Nor was there anything discussed warranting the refusal to permit members of Petitioner's family or others access to a judicial proceeding. The matter is of constitutional significance because of the Sixth Amendment right to a public trial and because of the broad review powers accorded the Courts of Military Review under Article 66 of the Uniform Code of Military Justice. Unexplained closed appellate hearings raise concerns about military due process and create perception problems for the military. *See* Art. 36(a), 10 U.S.C. § 836(a) (1988); *United States v. Ezell*, 6 M.J. 307 (CMA 1979); *Courtney v. Williams*, 1 M.J. 267 (CMA 1976).

When coupled with the Army Court of Military Review's claim to have reviewed a *Grafstefon* issue when no such issue was presented to the Court of Military Review, public confidence and the confidence of the young men and women serving in the armed forces in the fairness of the military justice system is weakened.

If the mistakes, sloppiness, and lack of attention to detail evident in Petitioner's court-martial and appeals are representative of the way criminal trials in the military are conducted, Article III judges should be greatly concerned about whether the constitutional rights of service members are being protected adequately in military trials. It is by the review of the Supreme Court of the United States and other Article III courts that civilian control over military trials is exercised. Greater review by this Court and other federal courts over decisions made by the United States Court of Military Appeals, the Military Courts of Review, and courts-martial will insure that the constitutional rights of service members are protected by the military justice system. Such review also will insure

that the federal judiciary, like the executive and legislative branches, is fulfilling its responsibility to exercise civilian review over the military.

CONCLUSION

Counsel for Petitioner respectfully requests that the Supreme Court of the United States grant the petition for a writ of certiorari in the present case because the court-martial which tried Petitioner was improperly constituted and lacked jurisdiction to try him, and because Petitioner was unlawfully tried in the military court system for conduct that he was tried and acquitted of committing in a state court. In addition, Petitioner contends that the Court should grant his petition for a writ of certiorari because of the problems of federalism raised by the failure of the convening authority to conform his action in Petitioner's case with the state decree on child support and alimony and because of the general denial of due process Petitioner experienced in the military justice system.

Respectfully submitted,

JAN HORBALY
5310 Renaissance Court
Burke, Virginia 22015
(703) 978-7909
Counsel for Petitioner

Date: January 28, 1994